

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

The Brennan Center Fair Courts E-lert summarizes news stories and editorials related to the independence of judges and the courts, including material attacking, defending, and concerning the judiciary.

Fair Courts E-lert

February 27, 2013

STATE JUDICIAL SELECTION

Constitutional Amendment on Judicial Selection Passes Tennessee Senate

Tennessee's Senate has approved a potential constitutional amendment that would change the selection process for judges. [According](#) to the Associated Press, "The proposal would maintain the current system for holding yes-no retention elections for appointed Supreme Court justices and appeals judges. It would do away with an independent nomination commission that narrows down the list of candidates for the governor to choose from. That system would be replaced by a confirmation process in the General Assembly." If the amendment also passes the House (with a two-thirds majority) it will be placed on the ballot in November. The AP article continues, "Supporters say the constitutional amendment would continue to prevent high-dollar judicial elections in Tennessee, while opponents [who support contested judicial elections] argue that it conflicts with the state constitution's provision that Supreme Court justices 'shall be elected by the qualified voters of the state.'"

Source: Erik Schelzig, [Senate Votes to Put Constitutional Amendment on Judicial Retention Elections on Ballot](#), Associated Press via *The Republic*, February 21, 2013.

Florida Considers Changes to Judicial Nominating Commission

A House committee approved a bill that would change the make-up of the state's nominating commission and give the governor more power in choosing judicial nominees. [According](#) to the News Service of Florida, "Under Florida law, when the governor chooses a judge to fill a vacancy on the circuit or county bench, one of the district courts of appeal or the Supreme Court, he chooses from a list sent to him by a judicial nominating commission. Each JNC has nine members, all of whom are chosen by the governor, though four of them have to come from a list of candidates provided by the Board of Governors of the Florida Bar. The members of the JNC serve four year terms, and can typically only be removed for cause." The change would "provide that the five

members of the JNC not selected from the Bar list would serve ‘at the pleasure of the governor.’” The article continues, “Democrats on the committee said it was a political power grab that would allow the governor – a Republican for many years – to choose the people who choose judicial candidates, allowing a governor to more easily ‘stack’ the courts. . . . Republicans, however, said the measure would make the judges more attune to the wishes of the people.”

Source: David Royse, [Florida House Democrats Decry ‘Court Stacking’ Motives In Judicial Nominating Commission Bill](#), News Service of Florida via *The News-Press*, February 20, 2013.

JUDICIAL ETHICS

ABA Weights In: Judicial Ethics and Social Media

The American Bar Association has issued Formal Opinion 462, speaking to the question of social media and the judiciary. According to the ABA’s [opinion](#), “A judge may participate in electronic social networking but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.” The ABA further clarifies, “A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification. For example, a judge may decide to disclose that the judge and a party, a party’s lawyer or a witness have an ESM [electronic social media] connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge’s ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.” The Wall Street Journal [reports](#), “‘It is unlikely to raise an ethics issue for a judge if someone ‘likes’ or becomes a ‘fan’ of the judge,’ the guidelines say. That said, ‘judges should be aware that clicking such buttons on others’ political campaign [social media] sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.’”

Sources: American Bar Association, Formal Opinion 462, [Judge’s Use of Electronic Social Networking Media](#) [PDF], February 21, 2013; Jacob Gershman, [Judges Urged to Think Before ‘Liking’ Someone](#), Wall Street Journal Law Blog, February 22, 2013.

JUDICIAL SALARIES

Op-Ed: Inadequate Judicial Salaries

Yale Law School Professor Stephen L. Carter wrote an opinion [piece](#) for Bloomberg highlighting the need for higher salaries for federal judges. Professor Carter writes, “For years, judges have complained about their pay. The Ethics Reform Act of 1989 provided for annual cost-of-living increases for judges and members of Congress. Political pressures have frequently driven Congress to suspend its own pay adjustments; when it does so, it generally suspends those of judges, as well.

This bizarre but by now almost automatic coupling has had unfortunate constitutional consequences.” He continues, “Some context: \$125,000 in 1989 dollars would be about \$228,000 in 2012 dollars. A federal district judge currently receives an annual salary of \$174,000. To most Americans, that probably sounds like a lot of money. But there are literally hundreds of executive-branch employees who earn more. So do first-year associates at many large law firms. By effectively cutting judicial compensation -- and make no mistake, that is what has happened -- Congress is reducing the incentives to remain on the bench for life. The framers would have been appalled.” Professor Carter also points out, “We ask the same sacrifice of others, of course. The difference is that when other federal employees leave to seek additional income, it doesn’t necessarily threaten the constitutional system. When judges do it, the independence of the third branch totters. This may not be the best time to urge that the federal government spend more money. If we do not, however, the courts will eventually face a crisis of legitimacy.”

Source: Stephen L. Carter, [The Other Crisis Facing the Federal Judiciary](#), Bloomberg, February 21, 2013.

JURISDICTION

Wisconsin Bill Would Bypass Lower Courts on Constitutional Questions

The President of the Senate in Wisconsin is writing a bill that would require the Supreme Court to take cases that include constitutional questions, bypassing the lower courts. [According](#) to the Associated Press, “Sen. Michael Ellis, R-Neenah, sent an email to all legislators Thursday asking for co-sponsors. He said the bill would lead to faster final decisions and eliminate confusion about whether a law is in effect during an appellate process that can drag on for years.” The article continues to explain, “Under Ellis’ bill, the Supreme Court would have original jurisdiction over any lawsuit alleging a statute violates the Wisconsin Constitution if the lawsuit is filed within a year of the statute becoming law. The high court would have to issue a decision within 120 days. The court would get an additional 30 days if the justices ask a lower court or referee for a determination of the facts or damages.”

Source: Todd Richmond, [Wisconsin Supreme Court Would Be Required To Take Cases Under Republican Bill](#), Associated Press via *Appleton Post Crescent*, February 15, 2013.

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